Filed 8/23/19 In re J.M. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

IN RE J.M., a Person Coming Under the Juvenile Court Law.	H046178 (Monterey County Super. Ct. No. 18JV000183)
THE PEOPLE, Plaintiff and Respondent, v. J.M., Defendant and Appellant.	

I. INTRODUCTION

Following a contested jurisdictional hearing, the juvenile court sustained a Welfare and Institutions Code section 602 petition alleging that the minor, J.M., made criminal threats (Pen. Code, § 422, subd. (a))[1] and threatened a public employee (§ 71). The court declared the minor a ward of the juvenile court and placed him on probation for 24 months.

On appeal, the minor contends that: the juvenile court's findings are not supported by substantial evidence; his adjudication of section 422 was barred under the *Williamson*[2]

[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] *In re Williamson* (1954) 43 Cal.2d 651, 654 (*Williamson*).

rule because the more specific statute, section 71, applied to his conduct; the juvenile court's findings violated the double jeopardy clause; the juvenile court failed to declare whether it sustained the offenses as felonies or misdemeanors as required by Welfare and Institutions Code section 702; and the juvenile court improperly included the maximum term of confinement in its disposition order.[3]

For reasons that we will explain, we reverse the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Incident*

On February 14, 2018, a school shooting occurred in Florida. The next day, the minor watched a CNN news program for students that was played for his class at the Community Day School. The Community Day School offered alternative placement for students with behavioral or truancy issues. "[O]n the 15th, the students were discussing [the shooting], talking about it amongst themselves and making jokes." The minor, age 13, was "[n]on-empathetic, kind of more joking about it, that it was funny." Along with two other students, the minor formed his finger into the shape of a gun and "shot [it] off into the air."

At some point later that morning, the minor was sent out of his classroom. When the minor arrived at the school office after being dismissed from class, the school secretary, Erica Parker, asked him to sit down. Parker had been told that the minor was dismissed from class because he had thrown something and used foul language.[4]

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[3] The minor also initially contended that the matter should be remanded for the juvenile court to exercise its discretion to amend the petition to conform to proof, which would render the minor's section 71 adjudication a lesser included offense of his section 422 adjudication under the accusatory pleading test and necessitate its striking. The minor conceded this claim in his reply brief.

[4] The record does not indicate that Parker was aware that while in class, the minor had formed his finger into the shape of a gun and made a shooting motion.

As part of her duties at the school, Parker would receive students who had been sent out of their classrooms either because they needed to finish their schoolwork or because of behavioral issues. If a student was acting out in class, he or she would be sent to Parker's office. She and a liaison would then address the student and determine whether the student would behave and could return to class. If the issue could not be resolved, a school administrator would be called in.

Parker was familiar with the minor and his disciplinary records and knew that he had been referred to the school because of his disruptive behavior. Parker was aware from behavioral reports and from her prior interactions with him that the minor "reaches high peaks of anger when he's upset." Although she had not witnessed any physical incidents, she knew from the school liaison that the minor had thrown a desk or a chair in frustration. Parker was also aware that at some point in the past the minor had knocked his chair to the ground and she knew that when he was in seventh grade in 2017, he had thrown a chair at the wall.

In response to Parker's request to the minor to sit down, the minor asked to stand outside by the door. Parker agreed, but the minor began to wander around. Parker asked him to come back. Parker observed that the minor's energy levels were very high and that he was not listening to her.

Parker called the assistant principal, David Diehl. During their conversation, it was decided that Parker would call the minor's father and ask him to pick the minor up from school. After her call with Diehl ended, Parker was going to call the minor's father, but the minor stated assertively, "[I]f you call my dad, it's going to be bad for you." Parker asked the minor, "[W]hat do you mean?" The minor replied, "[I]f you call my dad, it's going to be bad for you and everyone here."

Parker believed the minor and did not call his father. Instead, she called Diehl back and told him what the minor had said and that she did not feel comfortable calling

the minor's father. Parker told Diehl that if he wanted to call the minor's father, he needed to come to the school office and do it himself.

Parker was concerned that if she called the minor's father, the minor "would get aggressive or throw something, just escalating his – the [*sic*] emotions I guess." Parker believed that the minor "was letting [her] know he was threatening [her]. If you do it, this is going to happen." The minor's comments made Parker fear for her safety. Parker knew how aggressive the minor could get. Also, she was aware of "students hurting other people at schools with weapons." She was concerned about there being "a copycat kind of thing."

Diehl arrived at the office and asked the minor what was going on. The minor told Diehl "that if [his father] was called, it would be bad for [Parker], and then he corrected it or added actually everybody." Diehl did not call the minor's father. Instead, Diehl instructed Parker to call the police. Diehl stayed with the minor for safety purposes until the police arrived.

Parker was fearful for the rest of the day but then her fear dissipated because she talked to the minor's father. Parker felt safe because the minor was doing well at home "without being at school and having those triggers." It made Parker feel safe that the minor "is not in the area where he could have those high-picked [*sic*] anger emotions and maybe do something that he would regret."

B. *Petition, Findings, and Disposition*

An amended Welfare and Institutions Code section 602 petition was filed on May 31, 2018, alleging that the minor made criminal threats (§ 422) and threatened a public employee (§ 71).

The juvenile court found the allegations true at the jurisdictional hearing on June 20, 2018. The court observed that Parker had experience interacting with kids with behavioral issues, which gave her the ability to ascertain whether a student was simply behaving badly or whether it was something more serious. The court found that there had

been a school shooting the day before the minor was sent to Parker's office and that the minor had seen coverage of the shooting. The court determined that it was in that context that the minor made his statement to Parker that if she called his dad, "it will be bad for you," and that the minor was serious when he made the statement; he was not joking. The court noted that Parker gave the minor the opportunity to retract his statement and apologize, but that instead the minor "pushed forward and actually increased [his statement by saying], it will be bad for you and for everyone here . . . ."

The juvenile court found that the minor made the statement intending it to be a threat and that the statement was effective because neither Parker nor Diehl called the minor's father and instead called the police. The court determined that given the context of the situation, it did not "think that there [was] anybody in Ms. Parker's situation or in Mr. Diehl's situation, right after a school shooting when people are killed, to hear somebody say if you do X or if you don't do X, it's going to be bad for you or for everyone at the school. There's no other way to take that statement. [¶] And under the circumstances, there was nothing else that the school officials could do that would have been responsible [other] than to call the police."

At the July 12, 2018 disposition hearing, the juvenile court declared the minor a ward of the juvenile court for 24 months, placed him on probation with various terms and conditions, and ordered him to remain in his father's custody.

III. DISCUSSION

A. *Sufficiency of the Evidence*

The minor contends there is insufficient evidence to sustain the juvenile court's findings that he made a criminal threat in violation of section 422 and that he threatened a public employee in violation of section 71.

1. Standard of Review

" 'The standard of proof in juvenile proceedings involving criminal acts is the same as the standard in adult criminal trials.' [Citation.]" (*In re Cesar V.* (2011) 192

Cal.App.4th 989, 994.) The prosecution must prove beyond a reasonable doubt that the minor committed the offense alleged in the Welfare and Institutions Code section 602 petition. (*People v. Trujeque* (2015) 61 Cal.4th 227, 247; Welf. & Inst. Code, § 701.)

On appeal, we must determine " 'whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. [Citation.]' " (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1372.) "[T]he critical inquiry is 'whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*Id.* at p. 1371.)

In undertaking this inquiry, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence . . . from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).)

2. Sufficiency of the Evidence that the Minor Made a Criminal Threat in Violation of Section 422

To establish a violation of section 422, the prosecution must prove: " '(1) that the [minor] "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the [minor] made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat—which may be "made verbally, in writing, or by means of an electronic communication device"—was "on its face and under the

circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.' [Citations.]"[5] (*In re George T.* (2004) 33 Cal.4th 620, 630.)

The minor contends that none of the foregoing elements is supported by sufficient evidence. Regarding the first element, the minor asserts that he did not "willfully threaten to unlawfully kill or unlawfully cause great bodily injury" to Parker or another person when he stated, "[I]f you call my dad, it's going to be bad for you," and, "[I]f you call my dad, it's going to be bad for you and everyone here." (Capitalization and bold omitted.) The minor argues that "[s]tating 'It's going to be bad for you' is simply not a threat to unlawfully kill or cause great bodily injury to someone."

However, "it is the circumstances under which the threat is made that give meaning to the actual words used. Even an ambiguous statement may be a basis for a violation of section 422." (*People v. Butler* (2000) 85 Cal.App.4th 745, 753 (*Butler*).) "[T]here is no requirement that a specific crime or Penal Code violation be threatened." (*Id.* at p. 755.) Thus, in considering whether there was substantial evidence presented to support the juvenile court's finding that the minor's statements constituted a threat, we consider "all the surrounding circumstances and not just . . . the words alone. The

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[5] Section 422 provides in relevant part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally [or] in writing . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it was made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety . . . , shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

parties' history can also be considered as one of the relevant circumstances. [Citations.]" (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340-1341 (*Mendoza*).)

Criminal threat convictions that have been upheld on appeal include telling a victim that she needed to mind her own business or she " 'was going to get hurt' " (*Butler*, *supra*, 85 Cal.App.4th at pp. 749, 753); making the statements, " 'I'm going to get you,' " " 'I'll get back to you,' " and " 'I'll get you' " (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218 (*Martinez*)); and the statement, " '[Y]ou fucked up my brother's testimony. I'm going to talk to some guys from Happy Town.' " (*Mendoza*, *supra*, 59 Cal.App.4th at p. 1340). In each of those instances, the reviewing court considered not just the words used, but the surrounding circumstances in determining there was sufficient evidence that the statement constituted a threat to commit a crime causing death or great bodily injury. (*Butler*, *supra*, at pp. 753-755; *Martinez*, *supra*, at pp. 1218, 1220-1222; *Mendoza*, *supra*, at pp. 1340-1342.)

Here, the minor's words were menacing. The minor told Parker that if she called his dad, "it's going to be bad for [her]." When Parker asked the minor what he meant, the minor repeated his original statement and added that it would be "bad for . . . everyone here." In addition, Parker testified that the minor's demeanor was "assertive," "his energy levels were very high," and "[h]e was not listening to [her]." The minor's statements were made the day after a school shooting in Florida, which the minor and Parker were aware of. Parker knew from the minor's behavioral reports and from her interactions with him that the minor "reaches high peaks of anger" when upset and had thrown school furniture in the past, including throwing a chair at the wall.

The trier of fact was "free to interpret the [minor's] words . . . from all of the surrounding circumstances of the case." (*Mendoza*, *supra*, 59 Cal.App.4th at p. 1341.) When considered in context with the surrounding circumstances (*id.* at p. 1340) and in the light most favorable to the judgment (*Albillar*, *supra*, 51 Cal.4th at p. 60), we conclude there is sufficient evidence to support the juvenile court's determination that the

minor's statements constituted a "threat[] to commit a crime which will result in death or great bodily injury to another person." (§ 422.) As the juvenile court found, given the school shooting the previous day and the minor's behavioral history, "[t]here's no other way to take that statement."

We also conclude there is sufficient evidence that the minor made the threat "with the specific intent that the statement . . . be taken as a threat, even if there is no intent of actually carrying it out." (§ 422.) The minor first told Parker it was "going to be bad for [her]" if she called his father right after Parker ended her call with Diehl and was about to call the minor's father. When Parker asked the minor what he meant by his statement, the minor raised the stakes by telling Parker that if she called his father, it was "going to be bad" not just for her, but for "everyone here." And the minor repeated the broadened threat when assistant principal Diehl arrived at the school office and asked what was going on. "There is no reason for [the minor] to . . . say what he said if he had not had the specific intent that [Parker] interpret his actions as a threat." (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1348 (*Fierro*).) Although the minor argues that his statements were no more than " 'emotional outburst[s]' or 'mere angry utterance[s],' " we determine that the minor's repeated communication of the statements and his broadening of the language to include "everyone here," provides sufficient evidence of his intent. While "[s]ection 422 was not enacted to punish emotional outbursts, it [does] target[] . . . those who try to instill fear in others." (*People v. Felix* (2001) 92 Cal.App.4th 905, 913.)

Next, relying on *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*), the minor contends there is insufficient evidence that his threat was " 'so unequivocal, unconditional, immediate, and specific as to convey to [Parker], a gravity of purpose and an immediate prospect of execution of the threat.' " (See § 422.) We conclude otherwise.

" 'The use of the word "so" indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present

in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 340.) In *Ricky T.*, a 16-year-old student told his teacher, " 'I'm going to get you' " and "he would 'kick [his] ass,' " after the teacher accidentally struck him with a classroom door. (*Ricky T., supra,* 87 Cal.App.4th at pp. 1135, 1137.) In determining there was insufficient evidence to uphold the juvenile court's finding that the student made a criminal threat, the Court of Appeal observed that "[i]t is clear by case law that threats are judged in their context. [Citations.] By this standard, [the student's] 'threats' lack credibility as indications of serious, deliberate statements of purpose." (*Id.* at p. 1137.)

The circumstances in *Ricky T.* are readily distinguishable from this case. There, the student's statements "were made in response to his accident with the door." (*Ricky T., supra*, 87 Cal.App.4th at p. 1138.) Moreover, the teacher's response of "[s]ending [the student] to the school office did not establish that the threat was 'so' immediate." (*Id.* at p. 1137, fn. omitted.) "[T]he police were not called until the following day. . . . That execution of the threat was not so immediate is further evidenced by the fact that the police did not again interview appellant until one week later." (*Id.* at p. 1138.) Moreover, there was no evidence "to suggest that [the student and the teacher] had any prior history of disagreements, or that either had previously quarreled, or addressed contentious, hostile, or offensive remarks to the other." (*Ibid.*)

Here, in contrast, the minor's statements were not a spontaneous reaction to an accident. Moreover, after the minor made the statements, Parker immediately changed course and did not call the minor's father because she "believed him." Parker had observed the minor "reach[] high peaks of anger" when upset and was aware that he had thrown a chair at a wall at school. Parker testified that she thought the minor "was letting [her] know he was threatening [her]. If you do it, this is going to happen." Parker feared for her safety, in part because she knew of the minor's previous aggression at school. Diehl, too, declined to call the minor's father after the minor repeated the threatening

statement to him. Instead, Diehl told Parker to call the police and stayed with the minor for safety purposes until the police arrived. In addition, the minor made these statements the day after a school shooting in Florida. In light of this context, we determine there was sufficient evidence to support the juvenile court's finding that the minor's threats were "so unequivocal, unconditional, immediate, and specific as to convey . . . a gravity of purpose and an immediate prospect of execution of the threat." (§ 422.)

Lastly, the minor argues there is insufficient evidence that Parker was in sustained fear and that her fear was reasonable under the circumstances. "The phrase to 'cause[] that person reasonably to be in sustained fear for his or her own safety' has a subjective and an objective component. A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*Ricky T.*, *supra*, 87 Cal.App.4th at p. 1140.)

Regarding sustained fear, the minor asserts that "[t]he prosecution . . . presented no evidence as to the amount of time for which Ms. Parker was in fear." However, Parker testified that she believed the minor's statements, she feared for her safety, and she was fearful "that day and then it has gone away." The minor was sent to Parker's office at 9:00 a.m. and the police responded to the school at 9:30 a.m. The juvenile court could reasonably infer from this testimony that Parker was fearful from the time the minor made the threats in the mid-morning through the remainder of the day.

" 'Sustained fear' refers to a state of mind. As one court put it, '[d]efining the word "sustained" [in section 422] by its opposites, we find that it means a period of time that extends beyond what is momentary, fleeting, or transitory.' [Citation.]" (*Fierro*, *supra*, 180 Cal.App.4th at p. 1349, fn. omitted. [holding that the victim's testimony that he was fearful for 15 minutes after the threat was made is substantial evidence of sustained fear].) Parker's testimony that she was fearful for "that day" is sufficient evidence that she was in sustained fear.

The minor also contends that "any fear was not reasonable under the circumstances." The minor argues that "[i]t is not enough that Ms. Parker was afraid because of an incident that occurred on the news thousands of miles away," and observes that he "mentioned nothing about the [school] shooting." In addition, the minor asserts that "Parker had never known [him] to be physically violent toward anyone, and she had never had any type of altercation with him in the past." The minor's assertions do not persuade us given the circumstances present here.

First, the minor repeated his threat when Parker asked him what he meant, and when he did so, he broadened it to include "everyone here." He then repeated the broadened threat to the assistant principal, telling him "that if [his father] was called, it would be bad for [Parker], and then . . . add[ing] actually everybody." Second, the minor made the threatening statements the day after a school shooting in Florida, which Parker was aware of. Third, Parker knew that the minor had been sent out of his classroom because he had thrown something and used foul language. Fourth, the minor had a history of behavioral issues at school, which included throwing a chair at a wall. In addition, the minor "reach[ed] high peaks of anger when . . . upset." Parker knew of the minor's conduct and anger issues, and testified that it was the minor's "aggressi[on]" *and* the school violence that had been in the media that caused her to be in fear. In light of these circumstances, we conclude there is sufficient evidence that a reasonable person would have been in sustained fear when told, "[I]f you call my dad, it's going to be bad for you and everyone here."

For these reasons, we determine that a rational trier of fact could have found beyond a reasonable doubt that the minor violated section 422. (See *Albillar*, *supra*, 51 Cal.4th at p. 60.)

3. Sufficiency of the Evidence that the Minor Threatened a Public Employee in Violation of Section 71

The minor contends there is insufficient evidence to sustain the juvenile court's finding that he threatened a public employee.

"The essential elements [of] section 71 are: ' "(1) A threat to inflict an unlawful injury upon any person or property; (2) direct communication of the threat to a public officer or employee; (3) the intent to influence the performance of the officer or employee's official duties; and (4) the apparent ability to carry out the threat." ' [Citations.]"[6] (*In re Ernesto H.* (2004) 125 Cal.App.4th 298, 308 (*Ernesto H.*).) "[S]ection 71 . . . contains no requirement of immediacy." (*People v. Dunkle* (2005) 36 Cal.4th 861, 920, disapproved of on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Moreover, "section 71 does not require a finding that the perpetrator actually intends to carry out the threat. It requires only that the perpetrator intend that his threat cause the victim to do or refrain from doing an act in the performance of his or her duties and that it reasonably appears to the *victim* that the threat *could* be carried out." (*Ernesto H., supra*, at p. 315.) We conclude there is sufficient evidence in the record of each of the statute's elements.

As we stated above, the minor's statements to Parker that if she called his father it would be "bad for [her]" and "bad for [her] and everyone here," constituted sufficient evidence of a threat to commit a crime that would result in death or great bodily injury, and thus constituted " ' "[a] threat to inflict an unlawful injury upon any person" ' " as required by section 71, given that the initial threatening statement was repeated and broadened, the statements were made a day after a school shooting, and the minor's

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[6] Section 71 provides that: "Every person who, with intent to cause, attempts to cause, or causes, . . . any public officer or employee to do, or refrain from doing, any act in the performance of his [or her] duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out, is guilty of a public offense . . . ."

history of aggressive behavior at school. (*Ernesto H.*, *supra*, 125 Cal.App.4th at p. 308; see *id.* at p. 310 [a reviewing court "must examine not only the words spoken but also the circumstances surrounding the communication" when determining whether a statement meets the requirements of section 71].) The minor made the statements directly to Parker and to Diehl, both of whom were school employees. The minor's intent to influence Parker and Diehl's behavior was evidenced by his repetition of the statements and his word choice, telling Parker and Diehl that it would be "bad for . . . everyone here" and "bad for . . . everybody" if his father was called. Finally, there was sufficient evidence that it reasonably appeared to Parker that the minor's threat could be carried out. Parker testified that she believed the minor's statements and the statements caused her to fear for her safety. She also stated that she declined to call the minor's father after the minor made the statements. The minor made the statements while in the school office with Parker, and there is no evidence in the record that he did not have the ability to carry out the threat. (Cf. *People v. Boyd* (1985) 38 Cal.3d 762, 777 [determining that a defendant who was locked in his room at juvenile hall when he made his threat "was not in a position to carry out the threat, so the conduct posed no violation of section 71"].)

For these reasons, we determine that a rational trier of fact could have found beyond a reasonable doubt that the minor violated section 71. (See *Albillar*, *supra*, 51 Cal.4th at p. 60.)

B. *The* Williamson *Rule*

The minor contends that his adjudication of section 422 was barred under the *Williamson* rule (see *Williamson*, *supra*, 43 Cal.2d at p. 654) because section 71, a more specific statute, applied to his conduct.

1. Legal Principles

"Under the *Williamson* rule, if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as

creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute." (*People v. Murphy* (2011) 52 Cal.4th 81, 86 (*Murphy*).) Thus, the rule "precludes prosecution under a general statute when a more specific one describes the conduct involved. [Citations.]" (*Finn v. Superior Court* (1984) 156 Cal.App.3d 268, 271.) "Absent some indication of legislative intent to the contrary, the *Williamson* rule applies when (1) 'each element of the general statute corresponds to an element on the face of the special statute' or (2) when 'it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute.' [Citation.]" (*Murphy*, *supra*, at p. 86.)

"In its clearest application, the rule is triggered when a violation of a provision of the special statute would inevitably constitute a violation of the general statute." (*Murphy*, *supra*, 52 Cal.4th at p. 86.) "On the other hand, if the more general statute contains an element that is not contained in the special statute and that element would not commonly occur in the context of a violation of the special statute, we do not assume that the Legislature intended to preclude prosecution under the general statute. In such situations, because the general statute contemplates more culpable conduct, it is reasonable to infer that the Legislature intended to punish such conduct more severely." (*Id.* at p. 87.) "However, that the general statute contains an element not within the special statute does not necessarily mean that the *Williamson* rule does not apply. . . . '[T]he courts must consider the *context* in which the statutes are placed. If it appears from the entire context that a violation of the "special" statute will necessarily or commonly result in a violation of the "general" statute, the *Williamson* rule may apply even though the elements of the general statute are not mirrored on the face of the special statute.' [Citation.]" (*Ibid.*)

2. Analysis

The first circumstance where the *Williamson* rule applies to preclude prosecution under a general statute—when " 'each element of the general statute corresponds to an

element on the face of the special statute' " (*Murphy*, *supra*, 52 Cal.4th at p. 86)—is not present here. Section 422 requires immediacy and sustained fear, neither of which is required by section 71. (*Ernesto H.*, *supra*, 125 Cal.App.4th at p. 312.) In addition, section 422 requires a "threat[] to commit a crime which will result in death or great bodily injury," whereas section 71 prohibits a threat "to inflict an unlawful injury upon any person or property . . . ." Thus, section 422, "the more general statute[,] contains . . . element[s] that [are] not contained in the special statute." (*Murphy*, *supra*, at p. 87.)

The second circumstance where the *Williamson* rule bars prosecution under a general statute occurs "when 'it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute.' [Citation.]" (*Murphy*, *supra*, 52 Cal.4th at p. 86.) Regarding this circumstance, the minor argues solely that "a violation of the special statute will commonly result in a violation of the general statute. If one violates Penal Code section 71, subdivision (a), he has communicated a threat to inflict an unlawful injury and it reasonably appears that such threat could be carried out, and he has therefore met all the elements of Penal Code section 422, subdivision (a)." For the reasons we stated in the preceding paragraph, however, the communication of a threat to inflict an unlawful injury to a person or property and the appearance that the threat could be carried out *does not* meet all of the elements of section 422, which requires a "threat[] to commit a crime which will result in death or great bodily injury" (*id.*, subd. (a)) as well as sustained fear and immediacy (*Ernesto H.*, *supra*, 125 Cal.App.4th at p. 312).

Moreover, the Legislature's intent in enacting section 71 was "to prevent threatening communications to public officers or employees designed to extort their action or inaction." (*Ernesto H.*, *supra*, 125 Cal.App.4th at p. 308.) Although the statute applies to a narrower class of victims, it criminalizes a broader range of threats than section 422, as it applies to threats to inflict an unlawful injury upon a person or property, rather than solely threats to commit a crime causing death or great bodily injury (compare

§ 71, subd. (a) with § 422, subd. (a)), and contains no requirement of immediacy or sustained fear (*Ernesto H.*, *supra*, at p. 312). The minor has given us no reason to conclude that the elements of section 422 not present under section 71—namely, a threat to commit a crime causing death or great bodily injury, immediacy, and sustained fear—commonly occur in the context of a section 71 violation. Moreover, section 422, the more general statute, "contemplates more culpable conduct." (*Murphy*, *supra*, 52 Cal.4th at p. 87.) Thus, "it is reasonable to infer that the Legislature intended to punish such conduct more severely." (*Ibid.*; see § 1192.7, subd. (c)(38) [rendering section 422 a serious felony].)

For these reasons, we determine that the minor's adjudication of section 422 was not barred under the *Williamson* rule.

C. *The Double Jeopardy Clause*

The minor contends that his adjudication of the greater offense of section 422 and the lesser offense of section 71 violated the double jeopardy clause. However, because the minor did not raise the defense of double jeopardy in the juvenile court, his claim "is 'technically' not cognizable on appeal." (*People v. Scott* (1997) 15 Cal.4th 1188, 1201 [considering double jeopardy claim despite the nonobjection below because the defendant argued his counsel was ineffective].)

The minor's claim also fails because he was not subject to a second prosecution, nor did he incur multiple punishments for the same offense. "The Double Jeopardy Clause 'protects against *a second prosecution for the same offense after acquittal*. It protects against *a second prosecution for the same offense after conviction*. And it protects against multiple punishments for the same offense.' " (*Brown v. Ohio* (1977) 432 U.S. 161, 165, italics added.) "The first two categories of protection afforded by the double jeopardy clause, by their express terms, are clearly not implicated [by] multiple convictions in a unitary trial." (*People v. Sloan* (2007) 42 Cal.4th 110, 121.) As the

minor was not adjudicated a second time for the threats he made on February 15, 2018, or punished multiple times for the same offense, the double jeopardy clause does not apply.

D. *Failure to Declare Offenses Are Felonies or Misdemeanors*

The minor contends that we must remand the matter because the juvenile court failed to state whether it found his offenses to be felonies or misdemeanors as required by Welfare and Institutions Code section 702. The Attorney General counters that although the juvenile court did not explicitly find that the minor's offenses were felonies, the record as a whole establishes that the court was aware of and exercised its discretion to treat the offenses as felonies.

Welfare and Institutions Code section 702 provides that in a juvenile proceeding, "[i]f the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." Both of the minor's offenses here, making a criminal threat and threatening a public employee, are " 'wobbler[s],' " i.e., crimes "chargeable or, in the discretion of the court, punishable as either a felony *or* a misdemeanor." (*People v. Park* (2013) 56 Cal.4th 782, 789; see *id.* at p. 789, fn. 4; §§ 17, subds. (a) & (b), 422, subd. (a), 71, subd. (a)(1)-(2).)

The California Supreme Court has determined that Welfare and Institutions Code section 702's language is "unambiguous" and its "requirement is obligatory." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 (*Manzy W.*).) Welfare and Institutions Code section 702 "requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult. [Citations.]" (*Manzy W.*, *supra*, at p. 1204.)

The required declaration as to misdemeanor or felony may be made at the jurisdictional hearing or at the disposition hearing. (Cal. Rules of Court,

rules 5.780(e)(5), 5.790(a)(1), 5.795(a).)[7] "If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and *expressly declare on the record that it has made such consideration*, and *must state its determination* as to whether the offense is a misdemeanor or a felony." (Rule 5.780(e)(5), italics added; see also rules 5.790(a)(1), 5.795(a).) The juvenile court's determination must also be noted in an order or in the minutes from the hearing. (Rules 5.780(e), 5.795(a).)

The significance of an express declaration under Welfare and Institutions Code section 702 was explained by the California Supreme Court in *Manzy W.* Among other things, the court pointed out that a minor may not be held in physical confinement longer than an adult convicted of the same offense. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1205; Welf. & Inst. Code, § 731, subd. (c).) Requiring the juvenile court to declare whether an offense is a misdemeanor or felony "facilitat[es] the determination of the limits on any present or future commitment to physical confinement for a so-called 'wobbler' offense." (*Manzy W.*, *supra*, at p. 1206.) Further, "the requirement that the juvenile court declare whether a so-called 'wobbler' offense [is] a misdemeanor or felony also serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702." (*Id.*, at p. 1207.)

In *Manzy W.*, the minor admitted a drug possession offense that was a "wobbler" as well as a "joyriding" allegation, and the juvenile court dismissed two other allegations. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1202.) At disposition, the juvenile court imposed a felony-level term of physical confinement in the Youth Authority[8] but did not expressly declare the offense a felony. (*Id.* at p. 1203.) The California Supreme Court held that the failure to make the mandatory express declaration pursuant to Welfare and Institutions

[7] All further rule references are to the California Rules of Court.

[8] The Youth Authority is now known as the Department of Corrections and Rehabilitation, Division of Juvenile Justice. (Welf. & Inst. Code, § 1710, subd. (a).)

Code section 702 required remand of the matter. The court explained that "neither the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony. [Citation.]" (*Manzy W.*, *supra*, at p. 1208.)

However, remand is not necessarily required in every case when the juvenile court fails to make a formal declaration under Welfare and Institutions Code section 702. The California Supreme Court explained: "[S]peaking generally, the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error. . . . The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.)

The California Supreme Court ultimately concluded in *Manzy W.* that the matter should be remanded to the juvenile court for an express declaration pursuant to Welfare and Institutions Code section 702. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1211.) The court found "[n]othing in the record establish[ing] that the juvenile court was aware of its discretion to sentence the offense as a misdemeanor rather than a felony," and "it would be mere speculation to conclude that the juvenile court was actually aware of its discretion in sentencing Manzy." (*Id.* at p. 1210.)

In this case, the record does not clearly establish that the juvenile court was aware of and exercised its discretion to declare whether the minor's offenses "would be . . . felon[ies] or misdemeanor[s] in the case of an adult." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1204.) The court did not make an express declaration regarding whether the minor's offenses were felonies or misdemeanors during the jurisdictional or disposition hearing. The disposition order signed by the court includes a preprinted form with the statement:

"The court previously sustained the following counts. Any charges which may be considered a misdemeanor or a felony [f]or which [the] court has not previously specified the level of offense are now determined to be as follows . . . ." Listed beneath that statement is count 1 "PC 422a" and count 2 "PC 71." To the left of each of the listed offenses are two checkboxes, one labeled "Misdemeanor" and the other labeled "Felony," and the felony checkboxes for each count are checked. However, the language indicating that all of the "previously sustained . . . counts" are listed renders the order ambiguous because it suggests that the offenses would have been listed whether or not they were wobblers. For that reason, the disposition order does not clearly "establish[] that the juvenile court was aware of its discretion to sentence [each of] the offense[s] as a misdemeanor rather than a felony." (*Manzy, supra,* at p. 1210.)

The Attorney General argues that "the record as a whole reflects that [the juvenile court] was aware of and exercised its discretion to treat the offenses as felonies," and refers to language in the probation report, which the juvenile court signed. The probation report's referenced language states: "It is respectfully recommended that the Court declare this matter to be a felony." Although in its disposition order the court adopted the probation report's recommended findings, this, too, does not establish that the court was aware of and exercised its discretion to sentence each of the minor's offenses as misdemeanors. (See *Manzy, supra,* 14 Cal.4th at p. 1210.)

The Attorney General also references the juvenile court's selection of a future court date to hear the minor's motion to reduce his offenses to misdemeanors pursuant to section 17, subdivision (b), as evidence that the court was aware of and exercised its discretion to treat the minor's offenses as felonies. However, Welfare and Institutions Code section 702 "requires an explicit declaration by the juvenile court whether an offense [is] a felony or misdemeanor" (*Manzy W., supra,* 14 Cal.4th at p. 1204), and we determine that although the court set the matter for a section 17, subdivision (b) hearing, the record as a whole does not "show that the juvenile court, despite its failure to comply

with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature" of each of the minor's offenses (*Manzy W.*, *supra*, at p. 1209).

For these reasons, in an abundance of caution and in accord with *Manzy W.'s* requirement of an "explicit declaration by the juvenile court whether [the] offense would be a felony or misdemeanor in the case of an adult" (*Manzy W.*, supra, 14 Cal.4th at p. 1204), we will remand the matter to the juvenile court so that it may declare whether the minor's offenses of making a criminal threat and threatening a public employee are felonies or misdemeanors.

E. ***Imposition of Maximum Term of Confinement***

The minor contends that the trial court was not statutorily authorized to include the maximum term of confinement in its disposition order and requests this court to strike the language from the order. The Attorney General concedes that the maximum term must be stricken. We agree.

"When a minor is removed from the physical custody of his [or her] parent or custodian as a result of criminal violations sustained under Welfare and Institutions Code section 602, the court must specify the maximum term of imprisonment that could be imposed upon an adult convicted of the same offense or offenses. (Welf. & Inst. Code, § 726, subd. (c).)" (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.) However, a "juvenile court abuse[s] its discretion when it set[s] a maximum confinement term for a minor who . . . was not removed from the custody of his parents." (*In re A.C.* (2014) 224 Cal.App.4th 590, 591-592 (*A.C.*).)

Here, at the disposition hearing, where the juvenile court did not remove the minor from his parents' custody, the court stated that "the maximum potential custody time" was "three years and eight months." In its disposition order, the court indicated that "[t]he maximum time the child may be confined" was "3 years, 8 months." Because the juvenile court did not remove the minor from his parent's custody, the court erred when it set the minor's maximum term. (See *A.C.*, *supra,* 224 Cal.App.4th at pp. 591-592.)

Accordingly, we will order the juvenile court to strike the maximum confinement term of three years, eight months from the disposition order.

IV. DISPOSITION

The disposition order of July 12, 2018 is reversed and the matter is remanded for limited purposes. On remand, the juvenile court shall: (1) exercise its discretion under Welfare and Institutions Code section 702 and expressly declare on the record whether the minor's offenses of making a criminal threat (Pen. Code, § 422, subd. (a); count 1) and threatening a public employee (Pen. Code, § 71; count 2) are felonies or misdemeanors; and (2) strike the maximum confinement term of three years, eight months from the disposition order.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P. J.

MIHARA, J.

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